

Roger Williams University Law Review

Volume 23 | Issue 2

Article 7

Spring 2018

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Recommended Citation

Benson, Lenni (2018) "Finding the Forum that Fits: Child Immigrants and Fair Process," *Roger Williams University Law Review*: Vol. 23 : Iss. 2 , Article 7.

Available at: https://docs.rwu.edu/rwu_LR/vol23/iss2/7

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Finding the Forum that Fits: Child Immigrants and Fair Process

Lenni B. Benson*

I. “DOES THAT COME IN A CHILD’S SIZE?”

In the past four and a half fiscal years, the Customs and Border Protection (CBP) reported that roughly 223,794 unaccompanied minors were apprehended at the Southwest Border.¹ As overall apprehensions have gone down, the

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1. U.S. CUSTOMS & BORDER PROT., U.S. BORDER PATROL SOUTHWEST BORDER APPREHENSIONS BY SECTOR FY2018 (2018), <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions> [hereinafter SOUTHWEST BORDER APPREHENSIONS FY2018]; U.S. CUSTOMS & BORDER PROT., U.S. BORDER PATROL SOUTHWEST BORDER APPREHENSIONS BY SECTOR FY2017 (2017), <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions-fy2017> [hereinafter SOUTHWEST BORDER APPREHENSIONS FY2017]; U.S. CUSTOMS & BORDER PROT., SOUTHWEST BORDER UNACCOMPANIED ALIEN CHILDREN STATISTICS FY 2018 (2018), <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions>; U.S. CUSTOMS & BORDER PROT., SOUTHWEST BORDER UNACCOMPANIED ALIEN CHILDREN STATISTICS FY 2016 (2016), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>; U.S. CUSTOMS & BORDER PROT., SOUTHWEST BORDER UNACCOMPANIED ALIEN CHILDREN STATISTICS FY 2015 (2015), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2015>.

apprehension of youths has remained relatively high. In fiscal year 2017, these youths represent 13.34% of all apprehensions reported, while prior years had similarly significant percentages.² This Article argues that it is time to stop treating youth in the immigration system as anomalies. One size does not fit all. Our legal system must incorporate a forum that is designed to process and adjudicate immigration cases specifically for youth.

Context matters. All children, other than those born in Mexico or Canada, who are apprehended at the border or near the interior of the United States, are placed into removal proceedings. The overwhelming majority of these migrant children have travelled from three countries: El Salvador, Guatemala, or Honduras.³ The United Nations (U.N.) recognizes these three nations as amongst the five most dangerous countries in the world.⁴ Several

2 According to U.S. Customs and Border Patrol (CBP) reporting for FY2017, total nationwide apprehensions equaled 310,531 and total nationwide apprehensions of unaccompanied alien children (UAC) equaled 41,435. U.S. CUSTOMS & BORDER PROT., CBP BORDER SECURITY REPORT: FISCAL YEAR 2017 (2017); SOUTHWEST BORDER APPREHENSIONS FY2017, *supra* note 1. Thus, UACs account for 13.34% of nationwide CBP apprehensions for FY 2017. For the Southwest Border, total apprehensions equaled 303,916, while total apprehensions of UACs equaled 41,435. U.S. BORDER PATROL, SOUTHWEST BORDER SECTORS: FAMILY UNIT AND UNACCOMPANIED ALIEN CHILDREN (0-17) APPREHENSIONS FY17, COMPARED TO THE SAME TIME PERIOD FOR FY15 AND FY16 (2017), <https://www.cbp.gov/sites/default/files/assets/documents/2017Dec/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20-%20FY17.pdf>; U.S. BORDER PATROL, SOUTHWEST BORDER SECTORS: TOTAL ILLEGAL ALIEN APPREHENSIONS BY FISCAL YEAR (2017), <https://www.cbp.gov/sites/default/files/assets/documents/2017Dec/BP%20Southwest%20Border%20Sector%20Apps%20FY1960%20-%20FY2017.pdf>. Therefore, UACs made up 13.66% of all apprehensions at the Southwest Border.

3 SOUTHWEST BORDER APPREHENSIONS FY2018, *supra* note 1; SOUTHWEST BORDER APPREHENSIONS FY2017, *supra* note 1; U.S. CUSTOMS & BORDER PROT., SOUTHWEST BORDER UNACCOMPANIED ALIEN CHILDREN STATISTICS FY 2018 (2018), <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions>; U.S. CUSTOMS & BORDER PROT., SOUTHWEST BORDER UNACCOMPANIED ALIEN CHILDREN STATISTICS FY 2016 (2016), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>; U.S. CUSTOMS & BORDER PROT., SOUTHWEST BORDER UNACCOMPANIED ALIEN CHILDREN STATISTICS FY 2015 (2015), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2015>.

4 According to a 2013 report by the United Nations Office on Drugs and Crime (UNODC), Central America has the second highest sub-regional homicide rate in the world at 26.5 per 100,000 people, most of which can be

organizations have documented that children and young teens made the dangerous three-thousand mile journey to the United States due to “push factors” such as lack of security, lack of child protection, and systematic persecution by criminal syndicates and, in some cases, extortion by corrupt law enforcement.⁵ At the same time, many of the young people are seeking to be reunited with close family relatives. Former Department of Homeland Security (DHS) Secretary John Kelly estimated that sixty percent of all of the unaccompanied minors are eventually reunited with a parent or close relative who is residing, with or without authority, in the United States.⁶ Almost without exception, these unaccompanied youths arrive without visas, and few would have been able to secure either temporary or immigrant visas had they made an application at a U.S. Consulate in their country of origin.⁷

specifically attributed to the incredibly high rates of homicide in Guatemala, El Salvador, and Honduras. U.N. OFFICE ON DRUGS & CRIME, GLOBAL STUDY ON HOMICIDE 32–33 (2013).

5. *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 6–7 (Mar. 1, 2014), <http://www.unhcr.org/56fc266f4.html>.

6. Memorandum from John Kelly, Sec’y, Homeland Security, to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot. 10 (Feb. 17, 2017); see also SARAH PIERCE, MIGRATION POLICY INST., UNACCOMPANIED CHILDREN MIGRANTS IN U.S. COMMUNITIES, IMMIGRATION COURT, AND SCHOOLS 1 (2015).

7. The immigration statutes presume that all people seeking a visa to enter the United States intend to reside permanently. To obtain a temporary “non-immigrant” visa, an individual must prove they intend to depart the United States at the end of an authorized stay. See INA § 214; 8 U.S.C. § 1184. Children may enter the United States with tourist visas or through the visa waiver program available to some thirty-two countries. But if they intend to remain in the United States, these children must seek a different visa category. Older youth sometimes enter using foreign student visa. There are nearly 1.2 million international students with F (academic) or M (vocational) status studying in the United States according to the latest “SEVIS by the Numbers,” a quarterly report on international student trends prepared by the Student and Exchange Visitor Program (SEVP), part of U.S. Immigration and Customs Enforcement’s (ICE) Homeland Security Investigations (HSI). U.S. Immigr. and Customs Enforcement, *ICE Releases Quarterly International Student Data*, ICE NEWSROOM (Apr. 29, 2016), <https://www.ice.gov/news/releases/ice-releases-quarterly-international-student-data>. According to the report, “77 percent of all international students were from Asia. The top 10 countries of citizenship for international students included: China, India, South Korea, Saudi Arabia, Canada, Vietnam, Japan, Taiwan, Brazil and Mexico.” *Id.* In December 2017, New York had 139,976 active international students; New York University and Columbia University both have some of the highest

Pushed by danger abroad and pulled by close relatives within the United States, these youths are uniformly placed by CBP into removal proceedings before the administrative immigration court, a division of the Department of Justice (DOJ) called the Executive Office for Immigration Review (EOIR). Yet, as simple as that might sound, the migrant child is detained, examined, interviewed, vetted, and investigated by at least two other federal agencies, and while some children are released within two months, others are experiencing longer forms of federal detention under more restrictive constraints.⁸ At almost every stage, the children are not provided with independent legal advice nor any confidential counseling.⁹ Statements made to medical physicians or social workers are discoverable and shared with the prosecutors; and even those limited government funded nonprofits secured to provide “know your rights” and limited legal assistance are constrained by government contracts. For example, the current position of Health and Human Services, the organization that detains the migrant youth, appears to be that no legal provider contracting with them may litigate the nature or length of a child’s detention.¹⁰ Sadly, the detention of migrant children is such a complex and dynamic subject that it is beyond the scope of this Article to address. But ultimately, any reform of the adjudication of children’s cases would have to fully integrate limits on the use of detention and ensure appropriate quality and context if detention were to be used.¹¹

amount of international students. Dept. of Homeland Sec., *Mapping SEVIS by the Numbers*, STUDY IN THE STATES, <https://studyinthestates.dhs.gov/sevis-by-the-numbers> (last visited Mar. 3, 2018).

8. See *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017); see also *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1178 (N.D. Cal. 2017).

9. See Elizabeth M. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigration Youth*, 3 DUKE F. FOR L. & SOC. CHANGE 63, 66 (2011) (“The Immigration and Nationality Act provides that non-citizens have a right to counsel in removal proceedings ‘at no expense to the government’ and makes no exception for youth.”).

10. See *Contract Summary*, HHSP233201500041C, USA SPENDING, <https://www.usaspending.gov/#/award/23602704> (last visited Mar. 11, 2018). The limits on the power to sue were reported to me orally by several contract providers in three states. These individuals each requested anonymity when sharing this information.

11. See Daniel Ghezelbash, *The Rise and Rise of Mandatory Immigration Detention*, in PROTECTING IMMIGRANT CHILDREN: IN SEARCH OF THE BEST PRACTICE (forthcoming Aug. 2018); see also *Saravia*, 280 F. Supp. 3d at 1178–

The immigration process is confused, complicated, expensive, and painful. Further, the process fails to follow even rudimentary practices that are routine in child custody or juvenile cases within the United States. And that is just the beginning. All of these children must complete the deportation adjudication process before the EOIR, *without* appointed counsel, and with complex procedural and substantive burdens blocking access to fundamental protections. While our actual legal protections could be more generous and more robust, for many of these youths, the process is the real problem.

II. “CAN YOU TAKE THAT IN A BIT? DOES IT COME IN PETITE SIZES?”

Rather than simply declaiming that our existing system is a poor fit for the adjudication of children’s cases, this Article will provide some examples of recent EOIR rulings and changes in procedure that help illuminate the problems.

A. “*The Wrong Pocket*”

Even as all children are placed into removal proceedings before an immigration judge, both DHS and the EOIR have agreed that a more appropriate forum for hearing a child’s claim to asylum is in the non-adversarial interview conducted by trained asylum officers in a division of DHS known as the Refugee, Asylum and International Operations Directorate (RAIO) of the U.S. Citizenship and Immigration Service (USCIS).¹² So when a child, represented or not, appears before an immigration judge and states that she wishes to seek asylum, the judge instructs the child to complete the fifteen page form and to file it with the Nebraska Service Center of the USCIS, who will then direct it to one of eight national asylum offices, who will schedule the child for an interview.¹³ The process before getting to these asylum offices can

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¹² *Refugee, Asylum, and International Operations Directorate*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/about-us/directorates-and-program-offices/refugee-asylum-and-international-operations-directorate> (last updated Aug. 11, 2017).

¹³ *Instruction Sheet for an Unaccompanied Alien Child in Immigration Court to Submit a Form I-589 Asylum Application to U.S. Citizenship and Immigration Services (USCIS)*, UAC INSTRUCTION SHEET (U.S. Dep’t of Homeland Sec.), July 2014, <https://www.nationalservice.gov/sites/>

take months or even more than a year. The judge must then decide when to reschedule a hearing in the child's case. To the unrepresented, it may be very confusing, not to mention scary, that they have an open deportation hearing when they are waiting for adjudication of an asylum claim before the USCIS.

Still, the asylum office is a good place for a child's asylum application to be initially processed. This application process is a better fit than using removal proceedings. The asylum office has published guidelines for the handling of children's cases, and while its training could be more robust, it does offer some minimal training on how to conduct interviews involving children.¹⁴ The problem is not that the system is allowing children to move forward with an asylum interview, but rather, that DHS put the child into removal proceedings *before* the child had an opportunity to present her claim for asylum. The removal proceedings serve little government function at this stage in a child's case. The fear of deportation may act as a rough catalyst and sorting mechanism for driving some cases to the asylum office. But for children who are neither represented nor guided by the immigration judge on where and how to file, the removal hearing itself may create a barrier to seeking legal protection as a refugee.

Currently, the success of children seeking asylum is quite varied across RAIO's eight regional offices. In 2016, the New York Asylum Office granted between 20% and 30% of all requests made by children, the San Francisco office granted 86% of children's cases, and the Chicago office granted only 15% of cases.¹⁵ These huge differences in adjudication likely stem from a variety of factors including: disparate federal circuit law that can alter the substantive legal standards, the adequacy of legal representation, and the culture and guidance found by managers in the regional office. The RAIO has tried to increase consistency using a variety

default/files/resource/UAC_Instruction_Sheet_Handout.pdf.

14. See Memorandum from Joseph E. Langlois, Chief, Asylum Div., to Asylum Office Dirs. (Aug. 14, 2007), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/procedures-minor-children-raps.pdf>.

15. Amy Taxin, *Children's Asylum Approvals Vary by U.S. Region*, ASSOCIATED PRESS (June 2, 2016), <https://apnews.com/b140ad95d4a646e9aff67b8c80708e57>.

of approaches from requiring all cases be referred to the headquarters for review, to altering training programs, but as the volume of cases has grown rapidly, the RAIO minimized centralization and is letting each office complete its assessment. Any case the regional office does not approve is referred back to the EOIR. Essentially, the design allows the RAIO to simply kick the case over to the EOIR. All cases that are not approved return to the removal proceeding, and the immigration judge then schedules a *de novo* asylum trial. In most of the immigration courts it can take more than a year for this new asylum trial to take place. Remembering facts and preparing to give oral testimony subject to cross examination may be difficult for anyone, but for children and adolescents, this delay can be fundamentally detrimental to their psychological security and to their performance as witnesses.¹⁶

The current design appears to give the child strong procedural protections. Yet, the interactions in these systems may have instead lead to a culture of “let someone else decide” in some asylum offices that holds down grant rates. Meanwhile, the young person going through this system may experience years of delay, insecurity, and worry.

B. “Is Someone Authorized to Make a Decision About the Right Fit?”

Children need to have legal guardians or custodians. All the children discussed here were apprehended without an adult or legal guardian traveling with them.¹⁷ The federal process does not confer a formal legal grant of custody or guardianship to the people

16. Janna Ataiants et al., *Unaccompanied Children at the United States Border, a Human Rights Crisis that can be Addressed with Policy Change*, J. IMMIGRANT MINORITY HEALTH, Apr. 8, 2017, ResearchGate, DOI 10.1007/s10903-017-0577-5.

17. The United States saw similar large increases in the apprehension and surrender of family units during this same time period and from the same countries. 2015 to 2016 saw a 95% increase in Family Unit apprehensions at the SW Border—39,838 in 2015 to 77,674 in 2016. U.S. CUSTOMS & BORDER PROTECTION, UNITED STATES BORDER PATROL SOUTHWEST FAMILY UNIT SUBJECT AND UNACCOMPANIED ALIEN CHILDREN APPREHENSIONS FISCAL YEAR 2016 (2016), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>. Family Unit apprehensions from El Salvador, Honduras and Guatemala all practically doubled over that same period of time. *Id.*

who step forward to seek release of the child from HHS detention. These releases are accomplished with informal “sponsor agreements.”¹⁸ For children who cannot be reunified with one or both parents, “due to neglect, abuse, or abandonment,” there is another provision of immigration law that creates a path to permanent residence.¹⁹ This category, known as the “Special Immigrant Juvenile Status” is the only immigration statute that requires consideration of the “best interests” of the child; nonetheless, the statute delegates that decision-making to the state in which the child resides.²⁰ However, being in removal proceedings does not put the child into any state court protection process. The child and the adults who care for him or her must separately find a way to access the protection of the state courts. Most importantly, the immigration judge has no authority to direct the state courts or to instruct the child or his or her sponsor on how to seek custody or guardianship or to initiate state proceedings. Therefore, the child is in a forum, the immigration court, that is powerless to grant him the protection found within the immigration statutes.

It is clear that the substantive protection is there. Just as a child has a right to seek asylum, the child may qualify for a protective permanent status in the United States if only he can somehow find a way to access the state child protection process. However, it is unclear if DHS and the EOIR will continue to afford children time to navigate the state court process. There is a growing pressure to move the deportation case forward, even if the child is in the midst of pursuing this bifurcated state and immigration law protection. There is a disconnect between the forum and function of the statutes. Child protection just does not fit in the immigration court.

18. See *Unaccompanied Alien Children Released to Sponsors By State*, U.S. DEPT. HEALTH & HUM. SERV.: OFF. REFUGEE RESETTLEMENT (June 30, 2017), <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state>.

19. INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J) (2012); see Claire R. Thomas & Lenni B. Benson, *Caught in the Web: Immigrant Children in Removal Proceedings*, 15 IMPACT CTR. FOR PUB. INT. L. 37 (2016) (describing the process necessary for a youth to obtain Special Immigrant Juvenile Status (SIJS)).

20. Thomas & Benson, *supra* note 19, at 37.

C. *“Does This Come with a Protective Shield?”*

For many years, Congress has authorized protective visa status for those individuals who have been trafficked, forced or tricked into the United States or after arrival, and a similar protective status for victims of particular crimes within the United States.²¹ These two categories of protection, the “T” status and the “U” status can both lead to permanent residence in the United States and the lawful immigration of close family members.²² But all of this adjudication is outside the power of the immigration judge. Decisions on T and U status are made, after multiple forms and applications and assembling of evidence, by remote adjudication in regional service centers managed by the USCIS. These divisions are completely separate from the asylum office and the enforcement sections of DHS. The immigration judge can listen to a person say that they want to seek these protections, but no filing can be made with the court, and the judge has no power to adjudicate the application, nor to review it.

III. “ANY SPECIAL INSTRUCTIONS?”

Because the U.S. system begins with placing children in a forum where little can be done to complete adjudication of their statutory rights, the system is, by design, inefficient. Far more than merely cumbersome, the immigration court is so limited in its power to access and adjudicate protections afforded by substantive law that the process negates or frustrates access to these protections. In recent months, the leadership of the Department of Justice has made it even more difficult for immigration judges to adapt removal proceedings to the needs of children.

In late December of 2017, the Chief Judge of the EOIR repealed existing guidance that required special juvenile dockets, training for specialized judges, and provided some protocols for child friendly questioning.²³ The EOIR replaced the Procedures and Protocols with a watered-down version that admonished judges to be on the lookout for fraudulent claims by youth and stated that all judges

21. INA § 101(a)(15)(T)–(U); 8 U.S.C. § 1101(a)(15)(T)–(U).

22. *Id.*

23. See Memorandum from MaryBeth Keller, Chief Immigration Judge, to All Immigration Judges 6–7 (Dec. 20, 2017).

could conduct removal hearings for children, even those who have not had special training.²⁴ Recently, in New York City, the largest immigration court in the nation, children have been scheduled on dockets with unrelated adults and the nonprofit providers who were previously coming to the court on set docket days to try to aid unrepresented children have lost the ability to coordinate coverage and interview children due to a change in a number of court procedures.²⁵

Then in the first week of January 2018, Attorney General Sessions issued an order certifying an administrative appeal case

24. See *id.* at 8; see also Memorandum from David L. Neal, Chief Immigration Judge, to All Immigration Judges 4 (May 22, 2007). There are some strong differences between the two memoranda. Besides the loss of the required juvenile dockets, training for specialized judges, and child friendly questioning, the 2017 memorandum contains a section on unaccompanied alien children and how judges should interact with these cases. Memorandum from MaryBeth Keller to All Immigration Judges, *supra* note 23. First, it says that UAC's are eligible for voluntary departure and that judges should expedite those cases that want voluntary departure, especially if the child is in the custody of HHS. *Id.* It also says that the UAC status is not static, so judges should make sure the child is a UAC at the time of the adjudication. *Id.* It then states that UAC status is often misconstrued by undocumented children for the benefit of the status and that judges should be aware of this. *Id.* Next, it says that judges should be "vigilant" in adjudicating cases of UAC because of fraud and abuse by minors using the status to gain protection. *Id.* The new memorandum says that "[a]ll EOIR employees have an ethical duty to the United States government and its citizens to disclose 'waste, fraud, abuse, and corruption to appropriate authorities.' This duty applies to immigration judges" *Id.* (internal citation omitted). The 2017 memorandum also loses the 2007 section on "additional considerations" which tells judges they should be aware that some of these children suffer from things like PTSD from their home country and journey to the United States. Compare *id.*, with Memorandum from David L. Neal to All Immigration Judges, *supra*, at 4. The 2017 memorandum also makes changes from the 2007 memorandum about the "credibility" of minors. Compare Memorandum from David L. Neal to All Immigration Judges, *supra*, with Memorandum from MaryBeth Keller to All Immigration Judges, *supra* note 23. The 2017 memorandum states that even though children are not the same as adults, the credibility standards and burden of proof are not relaxed only because of a juvenile witness. Memorandum from MaryBeth Keller to All Immigration Judges, *supra* note 23. The 2007 memorandum does not contain this language when discussing credibility issues. See Memorandum from David L. Neal to All Immigration Judges, *supra*.

25. David Brand, *NYC's Immigration Court Erodes Accommodations for Children Without Attorneys*, CITY LIMITS (Feb. 13, 2018), <https://citylimits.org/2018/02/13/nycs-immigration-court-erodes-accommodations-for-children-without-attorneys/>.

to himself.²⁶ EOIR is a rare administrative agency where the head of the agency can delegate a decision of the appellate tribunal to himself for reconsideration in review. The case, *Matter of Reynaldo Castro-Tum*,²⁷ involves a young man who was alleged to be nineteen in 2016, and who had entered the United States in June of 2014. DHS apprehended Castro-Tum when he was only seventeen years old, and later HHS released him to a relative in Pennsylvania. His removal hearing was then scheduled before the immigration court in Philadelphia.²⁸ Mr. Castro-Tum did not appear for his hearings and after three continuances, in April of 2016, the prosecutor, ICE District Council, asked for an *in absentia* order.²⁹ The Immigration Judge refused the request and instead administratively closed the removal proceeding finding that the government had not provided sufficient proof that Mr. Castro-Tum was at the address provided by HHS.³⁰ Administrative closure is a docket control tool used by the immigration courts where a case is not terminated nor dismissed, but rather put on an inactive calendar until either party moves the court for rescheduling. On January 4, 2018, the Attorney General selected this unrepresented case involving an unaccompanied minor for reconsideration. Specifically, the Attorney General has asked for briefing from *amici curiae* on whether administrative closure is within the power of the immigration judges and whether it is used appropriately.

Administrative closure is one of the frequently-used tools in immigrant children's cases that vary wildly from the case of Mr. Castro-Tum. Generally, administrative closure is granted when the individual provides evidence to the court that he or she is the

26. *Matter of Reynaldo Castro-Tum*, 27 I&N Dec. 187 (A.G. 2018).

27. *Id.* This certification was issued January 4, 2018 from an appeal made by the Immigration and Customs Enforcement (ICE). *Id.*

28. *Matter of Reynaldo Castro-Tum*, A206-842-910, at *1 (BIA Nov. 27, 2017). As of this writing Attorney General Sessions has certified at least two other cases to himself which would have a direct bearing on juveniles cases. In one, he is challenging the authority of an Immigration Judge to grant a continuance, *see Matter of L-A-B-R*, 27 I&N Dec. 245 (A.G. 2018), and in another he is questioning the authority of an Immigration Judge to grant asylum protection to a victim of "private crime," *see Matter of A-B*, 27 I&N Dec. 247 (A.G. 2018). Almost all of the children seeking asylum have been victimized or persecuted by private actors and not by state or political actors.

29. *Matter of Reynaldo Castro-Tum*, A206-842-910, at *1.

30. *Id.* at *1-2.

beneficiary of a separate adjudication before the asylum office or the visa petition sections of USCIS, and is awaiting further agency action. If the immigration judge chooses not to close the proceeding pending that adjudication, the court would have three basic options: grant a further continuance for good cause;³¹ grant a dismissal of the suit without prejudice;³² or go forward and order removal of the individual.³³ If the court does order removal at this stage, the individual cannot complete the asylum adjudication. The future approval of a visa petition may be insufficient to allow completion of the immigration process, and the youth could be removed from the United States if the order is not appealed within thirty days.³⁴ The fact that someone may have a pending adjudication before the USCIS is not a legal basis for appeal of the underlying removal order.³⁵ While in theory, an individual could try to negotiate a

31. 8 C.F.R. § 1003.29 (2018).

32. *Id.* § 1003.106. The current position of the agency is that a dismissal, even without prejudice cannot be granted over the objection of the ICE counsel unless the judge finds the government has not been able to sustain its burden of proof. *See infra* note 33 and accompanying text.

33. Removal orders must be supported by clear, convincing and probative evidence but the burdens of proof may vary depending on the procedural posture of the charges presented by the government. *See* INA § 240; 8 U.S.C. § 1230 (2012). If ICE asserts that an individual entered without inspection, once the government has provided evidence of service and alienage or the respondent has admitted those allegations, the burden shifts to the respondent to prove inspection and admission. INA § 237; 8 U.S.C. § 1227. In my observation and in almost all cases, at least 95%, when respondents appear they admit the allegations. Although, there is no hard data to confirm this. *See* LAURA L. LICHTER, INTRODUCTION TO PRACTICE BEFORE THE EXECUTIVE OFFICER OF IMMIGRATION REVIEW *in* ALI-ABA COURSE OF STUDY, IMMIGRATION LAW: BASICS AND MORE 321 (2008) (“In many cases, removability is a forgone conclusion, with pleadings being entered as a quick ‘admit and concede’ in order to get on to the relevant applications for relief.”). However, after conceding removability, the individual may seek statutory relief from removal such as discussed here: asylum, becoming the beneficiary of a visa/status petition, or some other statutory relief. In the past a common form of request was to seek prosecutorial discretion and a grant of administrative closure of the case.

34. U.S. DEP’T OF JUST., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL (2017), <https://www.justice.gov/sites/default/files/pages/attachments/2017/02/03/biapracticemanualfy2017.pdf>.

35. Unless relief is immediately available in the immigration court, DHS may argue that the removal order should be issued. This is a sadly inefficient choice, for the government does not always remove these people because the same possibility of future relief usually supports an exercise of prosecutorial discretion on executing the order. Forcing the individual to later seek a motion

delay in removal or seek a motion to reopen once the USCIS adjudication is completed, in many cases the timing and the policy of DHS components would make this option entirely theoretical or impossible; particularly, for one of the categories of relief, Special Immigrant Juvenile Status. If the government deports a child who is the pending or approved beneficiary of a Special Immigrant Juvenile petition, but who had not yet completed the USCIS process of securing permanent residence under this category, there is no formal provision in the statute for overseas processing.³⁶ The removal could, and likely would, negate the statutory protections for a child who would have the legal right to stay in this country given the time to make their case.

It is too early to tell what the Attorney General will do in the *Castro-Tum* adjudication; however, it appears that the EOIR may lose one of the docket management tools that has been absolutely essential in children's cases. As noted above, the immigration judge is powerless to grant or adjudicate almost all of the claims for protection made by children. These adjudications are made outside of the docket control of the court and by multiple other fora: state, juvenile, or family courts, USCIS National Benefits Centers, Regional Asylum Offices, or Service Centers of USCIS dedicated to the adjudication of protections for victims of crime or trafficking. If the individual immigration judge cannot hold the removal litigation in abeyance, it is likely that judges will be forced to complete the adjudication with a finding that the child is removable. The child will then have to appeal to the BIA, if he or she has a legal basis for appeal, or beg ICE for a stay to allow completion of the external adjudications. He or she will also have to later seek a motion to reopen the removal proceedings to set aside the final order of removal to access the relief that might be granted by another component of DHS. Finally, should a child be removed, he or she is

to reopen is an inefficient method for both DHS and the EOIR.

36. The State Department Foreign Affairs Manual does conceive of issuing a special form of temporary visa to allow a child who is the beneficiary of a Special Immigration Juvenile petition to enter the United States to seek adjustment. See U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL AND HANDBOOK § 9 FAM 502.5-7(B) CERTAIN JUVENILE COURT DEPENDENTS (2017), <https://fam.state.gov/fam/09FAM/09FAM050205.html>; see also INA § 101(a)(27)(J)(i)–(iii); 8 U.S.C. § 1101(a)(27)(J)(i)–(iii) (2012).

likely to be subject to a ten-year bar on his or her return.³⁷ If a person who has been removed returns without permission and enters the United States without inspection that individual can be criminally prosecuted for the reentry, and even if not detected, may, by this illegal reentry after removal, render herself permanently unable to secure status in the United States.³⁸

While all of this administrative complexity, procedural morass, and multiple fora are challenging for skilled immigration counsel, a large and growing percentage of child migrants are also unrepresented.³⁹ At the current time, no federal court has ruled that it is a violation of due process to force children to represent themselves in removal proceedings.⁴⁰ The federal statutes and regulations allow a person to have counsel, and Congress has provided that the EOIR must facilitate access to counsel and encourage pro bono representation for children. Nevertheless, recent data still indicate more than seventy percent of the children may be without counsel.⁴¹ As this Article was being finalized, the Ninth Circuit Court of Appeals held that it was not a violation of due process for a thirteen-year-old child to have to proceed without appointed counsel, and that the child had failed to show he had a

37. INA § 212(a)(9)(A)(i)–(ii); 8 U.S.C. § 1182(a)(9)(A)(i)–(ii).

38. INA § 212(a)(9)(C)(i); 8 U.S.C. § 1182(a)(9)(C)(i).

39. See David Rogers, *Lawyerless child migrants caught in legal quagmire*, POLITICO (July 14, 2016, 8:58 AM), <https://www.politico.com/story/2016/07/child-migrants-legal-issues-225513>.

40. See, e.g., *J.E. F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016) (lacking jurisdiction but acknowledging the challenge of children facing removal proceedings without counsel). *J.E. F.M.* and other indigent immigrant minors brought a case before the federal district court that they were entitled to an attorney in immigration proceedings as they were indigent and minors. *Id.* at 1029. Minors are entitled to an attorney in family court proceedings (including juvenile court) but are not currently entitled to representation in immigration proceedings. The Ninth Circuit Court of Appeals accepted the DOJ argument that a child could not go to federal district court to seek appointment of counsel but must first exhaust all administrative processes, appeal to the BIA, and present the issue solely before the Federal Courts of Appeal. *Id.* at 1038. Immigration courts are not empowered to rule on constitutional claims. *Id.* at 1038; see also, *infra* notes 41–42.

41. See *Juveniles — Immigration Court Deportation Proceedings: Court Data through February 2018*, TRACIMMIGRATION, <http://trac.syr.edu/phptools/immigration/juvenile/> (last visited Apr. 17, 2018). The TRAC data is only a snap shot and it may be that some children obtain counsel at a later stage in the case.

prima facie eligibility for relief.⁴²

IV. “SIZED TO FIT THE FUNCTION.”

In a well-regarded landmark study of immigration adjudication, Stephen Legomsky, wrote that forum choices are not only critical to both fair and efficient adjudication but also to a system that can grow and adapt to changing circumstances.⁴³ In this article, Professor Legomsky focuses on forms of judicial and administrative review of immigration related decisions.⁴⁴ He surveyed the relevant administrative law and adjudication model literature and identified several key variables that define an excellent adjudication system.⁴⁵ He noted that these values are, at times, in conflict with one another, but that, on balance, these principles help us to design a well-functioning and potentially adaptive adjudication system.⁴⁶ These are:

- (1) **Accuracy**—does the adjudication result in the correct decision?⁴⁷
- (2) **Acceptability**—do participants within the system and external observers perceive the process as one that is fair?⁴⁸
- (3) **Efficiency**—does the system avoid unnecessary delays and redundancy?⁴⁹
- (4) **Consistency**—are similar cases resulting in similar

42. See *C.J.L.G. v. Sessions*, 880 F.3d 1122 (9th Cir. 2018) (rejecting due process claim to appointed counsel; one member of the panel limited his concurrence to the situation where a child was accompanied by his parent at the removal hearing).

43. Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1313–14 (1986) (relying upon a study completed for the Administrative Conference of the United States (ACUS) and building on the work of Roger Cramton); see Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 AD. L. REV. 108, 111–12 (1964).

44. Legomsky, *supra* note 43, at 1307–12.

45. *Id.*

46. *Id.* at 1313–14.

47. *Id.* at 1313.

48. *Id.*

49. *Id.*

outcomes?⁵⁰

- (5) **Opportunities for Correction of Error**—does the system provide an independent judicial review that allows opportunities for feedback, and results in increased accountability and transparency in adjudication?⁵¹

These values remain pillars of administrative law design, but alone do not adequately present the criteria we should use to design a system that would adjudicate the rights and claims for protection made by children. There must be an overarching principle: that any system seeking to make decisions about the rights and well-being of children should have additional protective characteristics that ensure the safety and well-being of the child. At the heart of any procedure, must be the universal standard of child protection—the best interests of the child. Unfortunately, existing U.S. immigration law barely raises this standard at any time in either substantive or procedural rules. It is time to integrate this protective goal in the design of the forum that will adjudicate all claims and actions involving migrant children.

V. “A UNIVERSAL GUIDE TO MEASUREMENT.”

While the criteria discussed above could be sufficient to guide, design, and evaluate current adjudications, the international legal and human rights community is moving to articulate fundamental characteristics that should be part of all systems addressing child migrants. In mid-November 2017, after months of meetings and discussion, two standing committees of the U.N., the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on Rights of the Child, jointly issued detailed comments that call upon nation-states to focus on an ethic of care in all respects to child migration, rather than a focus on immigration enforcement.⁵² These comments directly address

50. *Id.* at 1313–14.

51. *Id.* at 1314.

52. U.N. Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families & Comm. on the Rights of the Child, *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries*

the minimal protections found to be essential in allowing nation states to address migrant children and to adjudicate their claims for protection authorized most expressly by international covenants.⁵³ The United States is signatory to many of these international treaties, and has implemented the Refugee Convention⁵⁴ and the Convention Against Torture.⁵⁵ However, the United States is the only nation in the world not to have formally ratified the Convention on the Rights of the Child.⁵⁶

The U.N. will now move to integrate these suggested principles into new multistate compacts. The United States has expressed a willingness to engage in the new compact on refugee treatment, but has preliminarily refused to participate in the protection of migrants in general. Nevertheless, these thoughtful commentaries, developed after extensive consultation with governments and

of origin, transit, destination and return, ¶¶ 2, 12, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017), <http://www.refworld.org/docid/5a12942a2b.html> [hereinafter Comm. No. 4 (2017)]; U.N. Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families & Comm. on the Rights of the Child, *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, ¶ 1, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017), <http://www.refworld.org/docid/5a1293a24.html> [hereinafter Comm. No. 3 (2017)].

⁵³ Comm. No. 4 (2017), *supra* note 52, ¶ 1; Comm. No. 3 (2017), *supra* note 52, ¶¶ 11–18.

⁵⁴ See United Nations, *5. Protocol Relating to the Status of Refugees*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=V-5&chapter=5&clang=_en (last visited Mar. 13, 2018).

⁵⁵ See United Nations, *9. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-9&chapter=4&clang=en (last visited Mar. 13, 2018).

⁵⁶ Secretary of State Madeline Albright signed the Convention in 1995, however, President Clinton never presented the Convention for formal ratification and the U.S. Senate has neither ratified nor adopted any implementing legislation. See United Nations, *11. Convention on The Rights of The Child*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11&chapter=4&lang=en (last visited Mar. 13, 2018). For a general discussion of the rights of migrant children under the CRC, see Mary E. Crock & Hanna Martin, *First Things First: International Law and the Protection of Migrant Children*, in PROTECTING IMMIGRANT CHILDREN: IN SEARCH OF THE BEST PRACTICE (Lenni B. Benson & Mary E. Crock eds., forthcoming Aug. 2018).

expert groups, do provide us with a useful measuring stick.

In essence, the key points presented by these comments insist that any nation state apprehending or adjudicating the rights of children must ensure first and foremost that the child is not detained, is in a safe environment, and is represented by trained legal professionals who can address the child's fundamental welfare, as well as assist them in seeking applications for protection such as refugee or other legal status.⁵⁷ If a child is unaccompanied, the comments require a system where a guardian is appointed for the child.⁵⁸ In contrast, the United States system routinely uses detention, releases children informally and without the usual protections of guardianship proceedings, and does not provide free legal assistance to the majority of migrant children.

The comments also suggest key procedural protections, such as structural and proactive interventions by the State to make sure that the children have a right to be heard in a manner that takes into account the vulnerability and needs of children conducted by specialized officials or judges trained in communicating with children.⁵⁹

The U.N. commentaries also state that cases involving children should be given priority.⁶⁰ For many years, the U.S. Asylum Office has prioritized the processing and adjudication of children's claims for asylum. After filing a formal written application, a child may be interviewed within six weeks to six months.⁶¹ In contrast, as

57. Comm. No. 4 (2017), *supra* note 52, ¶¶ 5, 17(b)–(j).

58. *Id.* ¶ 17(i).

59. *Id.* ¶ 17(c).

60. *Id.* ¶ 17(g).

61. Adults who seek asylum before the USCIS Asylum Office are routinely experiencing a two to three year wait for an initial interview. The waiting times have grown longer as this agency was prioritizing children's cases. As this Article was being completed, the USCIS Asylum Office stated that to address the growing backlog they would turn to processing the most recently filed cases and the more than 300,000 pending cases would be given a lower priority. See *Report on Asylum Office Workload: December 2017*, U.S. CITIZENSHIP AND IMMIGR. SERVS. ASYLUM DIVISION (Dec. 2017), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_AffirmativeAsylumStatisticsDecember2017.pdf; *Memorandum on the Affirmative Asylum Interview Scheduling*, U.S. CITIZENSHIP AND IMMIGR. SERVS. ASYLUM DIVISION, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-interview-scheduling> (last updated Jan. 26, 2018). The USCIS Asylum Office is no longer formally prioritizing children's cases. See *id.*

noted above, in January of 2017, the EOIR issued a memorandum stopping the prioritization of children's cases, and as a result, a child may now face a two to four-year adjudication process before the immigration court. Further, the Attorney General is challenging the ability of the immigration judges to use administrative closure on proceedings where the child seeks adjudication in other fora.⁶²

Finally, the comments repeatedly require independent monitoring and access to judicial review.⁶³ While the existing U.S. system, in theory, may afford a child access to judicial review, in reality, the process is not tailored specifically to children. Review exists only if the youth knows how to first survive the administrative process and preserves challenges to secure ultimate review in the federal courts of appeals. There are no external monitors of the care and treatment of migrant children save for some limited monitoring resulting from a legal settlement and twenty years of litigation over the detention of migrant children.⁶⁴ In the past six months, two new class action suits have been filed challenging the arrest and detention of children, especially detention in secure facilities with no access to family nor legal counsel.⁶⁵

VI. "ASSEMBLING THE PERFECT FIT."

I am skeptical that any adjudication system is ever a perfect fit for long. Ultimately, systems erode unless they are well-built with adjusting mechanisms to handle volume, changes in context, and a change in the substantive legal environment. But the fact that we can't make a system perfect forever should not dissuade us from implementing structural reform now. Ideally, Congress, relevant agencies, and expert organizations would meet and discuss how

⁶² See Memorandum from MaryBeth Keller to All Immigration Judges, *supra* note 23.

⁶³ Comm. No. 4 (2017), *supra* note 52, ¶¶ 12–16.

⁶⁴ *Flores v. Sessions*, 862 F.3d 863, 869 (9th Cir. 2017). In recent litigation, the federal government has repeatedly urged the federal district court to dissolve the settlement and its provision for monitoring arguing that Congress has adequately provided for the care of children in legislation adopted ten years after the original settlement. To date, the federal courts have rejected these arguments in full. *Id.* at 880.

⁶⁵ See *Saravia v. Sessions*, 280 F. Supp. 3d 1168 (N.D. Cal. 2017).

best to adapt or reform our system. For many years, the government participated in interagency discussions with NGO representatives and collectively developed a series of best practices for the adjudication of children's cases.⁶⁶ However, those procedural suggestions neither sought to overhaul the entire system of multiagency adjudication, nor did they recommend any statutory modifications that would allow a different approach to the consideration and adjudication of children's cases. Instead, the authors worked carefully to try to improve the many-headed hydra that is our current adjudication model.

Building on my close observation of these cases for nearly ten years, I suggest that the United States must adopt and implement fundamental change. Rather than apprehend children, detain them by HHS, and adjudicate all immigration rights in the removal context, the federal government should create a specialized process for children, one that adheres to the focus on the child's wellbeing and not immigration enforcement. Thus, the first question is whether the Department of Homeland Security should be a part or home to the adjudication of a migrant child's right to remain within the United States. Instead, we could consider integrating children into our state juvenile and family court processes.⁶⁷ While that integrative model has some appeal because of the reality that most of today's unaccompanied children are being reunited with families who are living within the United States, I realize it is politically unrealistic. So instead, I propose that we must craft an

66. See JENNIFER NAGDA ET AL., SUBCOMM. ON BEST INTERESTS OF THE INTERAGENCY WORKING GRP. IN UNACCOMPANIED AND SEPARATED CHILDREN, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN (2016), <https://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/our-work/research/upload/Best-Interests-Framework.pdf>.

67. In the United States, we largely have left decisions about children to the state governments. We have a very small federal foster care program and no federal juvenile court fully empowered to handle issues of child protection. It may be time to recognize that we may need to create this authority for migrant children or to agree that once a child is physically present within a state territory, he or she, is subject to the power and protection afforded by that particular state. The burden does not fall evenly across the states, with only four states representing nearly forty percent of the released unaccompanied minor population: Texas, California, Florida, and New York. See *Unaccompanied Alien Children Released to Sponsors By State*, OFF. OF REFUGEE RESETTLEMENT (June 30, 2017), <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state>.

independent, non-adversarial body within DHS or another federal agency that would have, as its core mission, a focus on the best interests of the child. The design must come from a full recognition that children are children first and immigrants second.

Ultimately, we need to empower an independent tribunal with trained adjudicators who can make the decisions essential to the child's well-being and long-term options. In 1994, we separated the asylum officers out of general immigration adjudications so that they could become more skilled and focused on asylum related issues. We moved these officers several layers away from the role of immigration enforcement officers focused on detention or the execution of deportation orders. It is time to similarly create a specialized adjudicator corps for children's cases and to empower that group to adjudicate all the substantive legal claims for protection that a child might present.

This specialized adjudication model must include extensive training for the personnel at every level, from receptionists to security personnel. The environment should be designed with input from state experts on juvenile needs. It may be essential to add a corps of social workers who can make longer term field assessments of the child's environment, and because some children will ask to be returned to their country of origin, we will need the resources and skilled personnel who can make assessments of the home environment.⁶⁸ Congress has created a pilot project of child advocates,⁶⁹ who are there to serve as neutral best interest evaluators, but not to advocate directly for the child's expressed desires. In other words, they are not a substitute for appointed legal counsel for children.⁷⁰ And, just as in asylum cases and cases involving victims of domestic violence, adjudicators will need specific expertise in the cultural and national conditions of each child in order to fully and adequately evaluate their claims.

This would be a big change. It might also be an expensive one.

68. Congress has already mandated safe repatriation that requires assessment in the TVPRA, but the program is poorly funded and, even after ten years, no detailed regulations have been issued. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(5) (codified as amended 8 U.S.C. § 1232 (2012)).

69. *Id.* § 235(C)(5).

70. AM. BAR ASS'N, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES 3–4 (2004).

Nonetheless, we already have a behemoth: a complex system that is very expensive and is the result of the patched-together, cut down to size approach we have used for too long. Several analysts have even predicted that a system of appointing counsel would reduce the costs of the cases and the periods of detention such that the government would see a net savings.⁷¹

But a specialized adjudicator cannot operate in a vacuum. The forum choice alone is insufficient. As the U.N. comments note, nation states must provide for the health and safety of the children and provide experienced, competent legal counsel to aid them.⁷² We struggle to provide adequate representation for children in our domestic courts; nonetheless, we acknowledge that it is legally and constitutionally required.⁷³ By ignoring the reality of children's competence, experience, and legal status, we have allowed a problem to grow that is both harming the efficient operations of our asylum and immigration courts and failing the children.

At a minimum, we need to hold removal hearings before the immigration court in abeyance and reserve that forum, if it becomes necessary at all, for *de novo* review of all the claims for protection that have been made to the specialized children's agency. This would be a large undertaking and one that will be controversial. Immigration judges are not trained in family law or child protection. Although, the lack of training cannot justify our federal government's continued failure to adequately address the needs and rights of migrant children.

Immigration adjudication is one of the single largest areas of administrative adjudication, with millions of individualized decisions made daily. The EOIR has a backlog of nearly 600,000 cases.⁷⁴ The removal system works poorly from nearly every

71. See *City Bar Welcomes NERA Report Finding Appointed Immigration Counsel Would Pay for Itself*, N.Y.C. BAR (May 30, 2014), <http://www.nycbar.org/media-listing/media/detail/city-bar-welcomes-nera-report-finding-appointed-immigration-counsel-would-pay-for-itself>; see also *New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation*, VERA INST. OF JUST. (Apr. 7, 2017), <https://www.vera.org/newsroom/press-releases/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation>.

72. See Comm. No. 4 (2017), *supra* note 52, ¶¶ 17(f), 39–48, 54–56.

73. *In re Gault*, 387 U.S. 1, 41 (1967).

74. See ANDREW R. ARTHUR, CTR. FOR IMMIGRATION STUDIES, THE MASSIVE

perspective. It is time to admit that our model cannot be cut down to child size.

Unfortunately, the political trend that appears to have traction in Congress is to truncate the rights of all migrants, and specifically, children. Mexican children are quickly screened and, unless the CBP inspector believes the child is a victim of a severe form of trafficking or is returning to persecution, the child is returned immediately to the Mexican territory.⁷⁵ There is no additional process, no asylum hearing, no independent judge nor any detailed administrative record that could be reviewed. Between 2014 and 2017, 47,449 Mexican children were apprehended and almost all were returned summarily. Some members of Congress believe that putting children into the removal system is unnecessary and creates delays. Allowing children to be reunified with families living without status in the United States creates a potential incentive for illegal migration both by parents and later by children. Instead, these members have proposed legislation that would authorize the State Department to negotiate rapid return provisions with other countries and eliminates almost all options for independent hearings before either an asylum officer or an immigration judge.⁷⁶ The proposed legislation would allow DHS to detain children up to thirty days, while under existing procedures, children must be transferred to HHS within seventy-two hours.⁷⁷ The bill as proposed would give children who are unable to articulate a fear of persecution or severe trafficking to be detained and have a hearing within fourteen days before an immigration judge.⁷⁸ The statutory proposal directly contradicts

INCREASE IN THE IMMIGRATION COURT BACKLOG, ITS CAUSES, AND SOLUTIONS 4 (2017), <https://cis.org/sites/default/files/2017-07/arthur-court-backlog.pdf>.

75. See APPLESEED, CORE PRINCIPLES: CHILD REFUGEES IN THE UNITED STATES 1, 3 (2014), <http://appleseednetwork.org/wp-content/uploads/2014/07/Appleseed-Core-Principles-Child-Refugees-in-the-United-States.pdf>.

76. See Protection of Children Act of 2017, H.R. 495, 115th Cong. (2017). The name seems deeply at odds with the language of the bill which cuts back and curtails provisions of the existing Trafficking Victims Protection Act.

77. *Id.*

78. *Id.* §§ 2(a)(1)(B)(ii), 2(a)(2)(B)(A). Three non-profits released a joint statement condemning this proposal; reasoning that it will reduce effectiveness and accessibility of system, increase use of detention, and limit due process. See *Protection of Children Act of 2017: Hearing on H.R. 495 Before the H. Comm. on the Judiciary*, 115th Cong. 1 (2017) (statement of Lutheran Immigration and Refugee Service, et al.).

the *Flores* settlement on when children can be detained, and contradicts the U.N. admonishments against detention.⁷⁹ The bill neither includes a provision requiring attorneys for children, nor any specialized medical or expert assessment of the best interests of the child.⁸⁰ While it might result in more fast-tracked removals, it is unlikely to be as efficient as Congress might wish. If an immigration judge does believe a child has a fear of persecution or harm, the judge is likely to delay the removal to allow for the full development of the record. In 2016, immigration judges reversed nearly thirty percent of the fear assessments for adults seeking asylum and apprehended near our borders.⁸¹ Over time, this process too, would become stretched, stressed, and backlogged. A truncated and rushed process will not fit.

The phenomenon of children on the move, and frequently on the run, is growing around the world. Currently the UNHCR estimates that fifty percent of all people seeking refugee status are women and children.⁸² The U.N. and other NGOs are grappling with the complexity and political reluctance to address the needs of these children directly. The United States must step forward into the discussion and address the forum choices.

Delay will not resolve the issue. Asking immigration judges to adjudicate more rapidly will not resolve the issues. Based on the first quarter of 2018, CBP is on target to arrest more than 45,000 children this year.⁸³ The children are coming, and we are not

79. See H.R. 495.

80. See *id.*

81. See EOIR Statistical Yearbook Fiscal Year 2016 Table 5. <https://www.justice.gov/eoir/page/file/fysb16/download>. See also Lenni B. Benson, *Immigration Adjudication: The Missing "Rule of Law,"* 5 J. ON MIGRATION & HUM. SEC. 331, 336 n.13 (2017).

82. INTERNATIONAL ORGANIZATION FOR MIGRATION, GLOBAL MIGRATION TRENDS FACT SHEET 2015, at 5 (2016), <http://gmdac.iom.int/global-migration-trends-factsheet>. Notably, fifteen percent (37 million) of all international migrants are below the age of twenty years old. *Id.*

83. Press Release, U.S. Dep't. of Homeland Sec., Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes (Feb. 15, 2018), <https://www.dhs.gov/news/2018/02/15/unaccompanied-alien-children-and-family-units-are-flooding-border-because-catch-and>. This press release states that apprehensions of unaccompanied children increased by thirty percent since October of 2017. *Id.* Sadly, this statement from DHS contains many misleading statements and refers to "loopholes" in our system instead of perceiving the humanitarian choices guaranteed by both international and domestic law as part of an adjudication

ready. Our patchwork, confusing adjudication system must be reformed. It is time for Congress to begin again, making real the promise of humanitarian protection, ensuring access to counsel, and the basic protections of the best interests of the child.

system mandated by law. Certainly, the statement can be read as revealing an agency that is perceiving this flow of vulnerable children through an assumption that the youth are manipulating or falsifying claims for protection.